

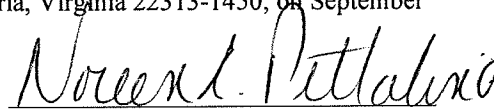
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Gardenier, et al. Confirmation No.: 1803
Serial No.: 10/621,749 Group Art Unit: 3751
Filed: July 17, 2003 Examiner: Phillips, Charles E.
Title: SOUND SYSTEM AND A HEAD REST FOR A SPA AND
A SPA HAVING A SOUND SYSTEM

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being electronically transmitted to: Mail Stop Appeal Briefs – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450, on September 22, 2008.


Noreen Pettalino

Date of Signature: September 22, 2008

To: Mail Stop Appeal Briefs – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

**RESPONSE TO EXAMINER'S ANSWER TO APPELLANT'S APPEAL BRIEF TO
THE BOARD OF PATENT APPEALS AND INTERFERENCES
PURSUANT TO 37 C.F.R. §41.41**

This Response is being filed in response to the Examiner's Answer mailed on July 21, 2008. Since the 2-month due date for filing this Response falls on Sunday, September 21, 2008, this Response is being filed on Monday, September 22, 2008, and is therefore timely filed.

Response to Examiner's Comments

In response to the Patent Office's comments under the heading, "(10) Response to Arguments," the Patent Office argues that Figure 5 of Ludlow discloses "a head rest [175] 'mounted on or below the upper rim so as not to alter the substantially uniform elevation.'" However, first, contrary to the present invention, the head rest 175 of Ludlow is devoid of any "sound emitting perforations" as recited in claim 65, and respectfully submits that nowhere in Ludlow are such perforations disclosed or in anyway suggested by Ludlow. The Appellant submits that from this distinction alone, this rejection of claim 65 as obvious in view of Ludlow and Kvalvik is inappropriate.

Then the Patent Office relies on Kvalvik to provide the speaker missing from Ludlow without, as discussed in the Appeal Brief, any consideration of the teachings and limitations of Ludlow for the introduction of such a speaker. Moreover, the Appellant submits that the Patent Office cannot simply introduce the teachings of Kvalvik to cite one limitation of claim 65 and dispense with another limitation of claim 65. Claim 65 still recites a head rest mounted "not to substantially alter the substantially uniform elevation." Kvalvik includes a head rest 30 and some form of electronic device A. However, clearly the introduction of the device A "substantially alters the substantial uniform elevation" of tub cushion 10 which is inconsistent with the invention recited in claim 65. The Appellant submits that the Patent Office cannot combine the teachings of references in a vacuum; the combination can only be considered in view of the entire disclosed invention. In this case, the Appellant submits that introducing the device A of Kvalvik inherently interferes with the claimed "head rest mounted...so as not to substantially alter the substantially uniform elevation" of the upper rim of the spa. Again, contrary to accepted requirements of an appropriate 103 rejection, the invention recited in claim 65 is not obvious in view of Ludlow and Kvalvik.

The Patent Office also states, “it is mere speculation...that the shape of the Ludlow headrest would have to be altered to accommodate a speaker.” The Appellant finds this position surprising since the only art cited to disclose an electronic speaker, Kvalvik and Diamond, clearly markedly alters its tub structures to accommodate a speaker. Kvalvik introduces a raised head rest 30 to the otherwise “substantial uniform elevation” of its liner; Diamond introduces a collar 30 to the otherwise “substantial uniform elevation” of the upper rim 28 of its bathtub 10. Clearly, contrary to the Patent Office’s comments, the Appellant is not “merely speculating”; the cited art supports such an observation.

In support of its position the Patent Office also cites *In re Keller*, and contends that *In re Keller* teaches, “the test is what the combined teachings would have suggested to those of ordinary skill in the art.” [Emphasis added.] It follows that either Ludlow or Kvalvik must somehow “suggest” their combination. However, the Patent Office does not identify where in Ludlow or Kvalvik their combined teachings are suggested. The Appellant submits that nowhere in Ludlow is a speaker or perforated head rest disclosed or suggested, and nowhere in Kvalvik is a head rest not “substantially altering the substantial uniform elevation” disclosed or suggested. Thus, by the Patent Office’s own reasoning, this rejection of claim 65 as obvious in view of Ludlow and Kvalvik is untenable.

The Appellant submits that more appropriate guidance is provided by the Supreme Court’s advisories in *KSR*, as discussed in the Appellant’s Appeal Brief. In particular, the Appellant submits that there is no “apparent reason” to combine the teachings of Ludlow and Kvalvik. The Appellant submits that Patent Office has not provided any “explicit” reasons for combining the teachings of Ludlow and Kvalvik, as required by the Supreme Court’s instructions.

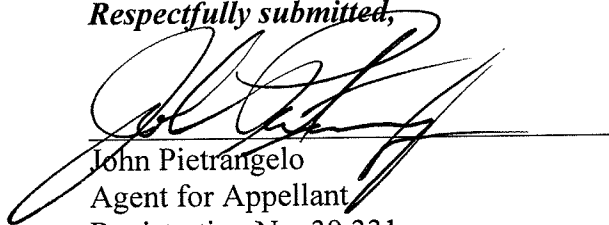
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-4-

Attorney Ref.: 1442.033B

Accordingly, for all these reasons, the Appellant again respectfully requests that the Office Action made Final be reversed in all respects.

Respectfully submitted,



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Agent for Appellant
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Dated: September 22, 2008

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